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Why Law?

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Why Law?

By James M. Donovan

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According to the 2011 Statistical Abstract, legal services in 2007 reported gross receipts of 267 billion dollars. Students view it a wise investment to incur debts on average of \$100K to go to law school for the chance to assume roles in the legal system.

If we assume people to be minimally rational, such investments are reasonable only if we believe law serves a valuable purpose, one that merits our money and, for many, our lives. Efforts to describe the details of that importance, however, can be exasperatingly vague.

This question matters for reasons other than the soundness of economic choices. To know the work that law is supposed to perform can lead to better management of legal institutions. Critics warn that our system of law has grown beyond all tolerable limits (*Jurismania* (2000); *The Death of Common Sense: How Law is Suffocating America* (1995)). Most of us do not hesitate to label some law "good" or "bad." Too often, however, such conclusions treat law as a means to some other end (e.g., economic benefit, moral dominance), which makes the standard flexible according to the interests of each person rather than intrinsic to law itself. A "bad" law is one that runs up the deficit, without any mediating argument that deficit control is a core task of a legitimate system of law.

A sociological answer to the question of law's essential nature follows from its character as one of the forms of social regulation, the common goal of which is to create order, to impose a collective template upon a mass of self-interested individuals. Religion and custom are two other tools in this kit. Law is that one which stands as a "disciplined

coercive force" able to impose sanctions for violations of rules.

Satisfaction with this account depends upon other questions. Is law something present in all societies, or is it enjoyed by only a few? The demand that legal sanctions be state-imposed – as Brian Tamanaha requires – is not obvious, and would exclude traditional societies below the state level. Identifying what these societies lack that warrants describing them as "lawless" typically looks only at Western legal paraphernalia – courts, legislatures, written codes, police. If indeed such trappings are all that make law, it becomes difficult to justify law's lofty status since it would owe its value to accidental things outside itself.

The conclusion is twofold: Knowing the unique task of law is necessary if we hope to build meaningful legal institutions, yet the typical identifications of that defining attribute have been uniformly unsatisfying. The task is particularly challenging if one is committed to the dual convictions that law is a cultural universal, and that law performs specialized work unsuited to the other institutions of social regulation.

What then is the answer? My own proposal, argued in *Legal Anthropology: An Introduction*, is that the work of law is not simply to impose order – all social institutions do that, by definition – but rather to foster perceptions of fairness about structural inequalities. Inequalities are inevitable within any group of human beings. As Rawls recognized in *A Theory of Justice*, a major challenge for any society is to prevent these inevitable divisions from threatening the long-term viability of the group.



One part of the complete solution is for members to believe that their social complaints are taken seriously and addressed according to known rules and precedents, even if no improvement actually occurs. Where there cannot be distributive justice, there should at least be procedural justice. Legal ethnographers John Conley and William O'Barr have documented that for many small court plaintiffs an opportunity to tell their story is often more important than winning the case. Truth Commissions teach much the same lesson. Other forms of social regulation like religion and custom lack the fluidity and sensitivity to individual context to secure this sense of personal dignity. If the cultivation of the experience of social worth is conceded to be critical to the maintenance of a stable society, it can come only from law.

Fairness, then, not order, is the special domain of law. The accompaniments of law we expect in our society flow less from law itself, and more from our changing understanding of what is fair. As our understanding of fairness changes, we expect the law to change as well. Because fairness criteria have been shown empirically to vary from society to society, we can expect legal diversity to remain an enduring feature of the jurisprudential landscape. But now we know why.

The "justice as fairness" view is not a complete answer concerning the nature and role of law, but it may prove to be more useful and intellectually satisfying.